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Nos. 73-1440, 73-1441, 73-1442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

McBRYDE SUGAR COMPANY, LIMITED, and OLOKELE SUGAR COMPANY, LIMITED, *Appellants*,

v.

STATE OF HAWAII, ET AL., *Appellees*.

SELWYN A. ROBINSON, ET AL., *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents*.

IDA ALBARADO, ET AL., *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents*.

On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writs of Certiorari to the Supreme Court of the State of Hawaii

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF HAWAIIAN SUGAR PLANTERS' ASSOCIATION AND BRIEF

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Comes now HAWAIIAN SUGAR PLANTERS' ASSOCIATION and respectfully moves the Court for entry of an

order granting leave to file the attached brief in support of the jurisdictional statement and petitions for writs of certiorari in the above cases. Counsel for all appellants and petitioners have consented to the filing of the brief. Although requested to do so, appellee and respondent State of Hawaii has declined to consent.

HAWAIIAN SUGAR PLANTERS' ASSOCIATION is an unincorporated association whose members include all sugar plantations engaged in sugar production in Hawaii.

The continued successful operation of most of those plantations is directly dependent upon their right to continued use of water sources and irrigation facilities developed and relied upon, as the key to successful agricultural enterprises, during the past one hundred years. The opinion of the Hawaii Supreme Court drastically changes the law relating to ownership and transportability of water in Hawaii. It would also destroy the value of privately owned water sources and distribution systems developed during a century of governmental encouragement under the protection of laws respecting private ownership and use of water resources.

Movant seeks leave to file the attached brief to emphasize aspects of the questions before the Court different from those presented by the parties, illuminating the substantiality of the Federal questions involved. The brief stresses the importance of the domestic sugar industry to the national and international interests of the United States and the adverse impact the State court judgment will have upon that industry,

contrary to declared Federal policy as embodied in United States statutes.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE, HAWAIIAN SUGAR PLANTERS' ASSOCIATION, IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT AND PETITIONERS' REQUESTS FOR WRITS OF CERTIORARI

This brief amicus curiae is submitted on behalf of HAWAIIAN SUGAR PLANTERS' ASSOCIATION ("HSPA")

in support of appellants' and petitioners' jurisdictional statement and petitions for writs of certiorari in the captioned cases.

INTEREST OF THE AMICUS CURIAE

HSPA is an association of all plantation companies engaged in sugar production in Hawaii and individuals directly concerned with the Hawaiian sugar industry. Organized in 1882 to promote the sugar industry of Hawaii, it has been responsible for scientific improvements enabling Hawaii to be a leader in agronomic efficiency. Research carried on by its Experiment Station has led to the development of such disease resistant and productive varieties of cane that Hawaiian plantations produce more sugar per acre than any others in the world.[1] Currently the Association is engaged in intensified research to develop efficient methods of utilizing the vast amounts of water required to irrigate cane. In the case presented for review, the Hawaii Supreme Court astounded the agricultural and legal communities in Hawaii by overturning a century of precedents to hold that surplus water is not owned by the owner of the land on which it arises and that water can be used only on the land to which it is appurtenant or riparian. The decision, if unmodified, will severely cripple the Hawaiian sugar industry. The HSPA, therefore, urges review and reversal of that decision.

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[1] Hawaiian Sugar Planters' Assoc., Sugar Manual, 4 (1973). HSPA annually invests nearly as much as does the U.S. Government in research on sugar; that is, about $2.5 million as compared with $3.0 million. U.S. House of Representatives Committee on Agriculture, The United States Sugar Program (hereinafter cited as "Sugar Program"), 4 (1970). HSPA is principally supported by assessments levied upon its plantation members.

ARGUMENT

Sugar Production Is Federally Regulated in the Public Interest.

The fate of the Hawaiian sugar industry is not merely a local problem; it is a matter of national concern.

Sugar has been a regulated commodity since the first Act of the First Congress of the United States, which imposed a tariff upon imported sugar as a revenue producing measure.[2] Excepting only four years beginning in 1890, sugar has been a duty import ever since. More importantly, for the past forty years the supply of sugar to the United States has been rigidly controlled by Congress.[3] The principal aims of this control have been to assure an adequate supply of sugar to the U. S. market at reasonable prices and to protect and maintain the domestic sugar industry. The Sugar Act has been characterized by the Chairman of the U.S. House of Representatives Committee on Agriculture as "one of the most comprehensive and complex agricultural laws within the legislative responsibility of this committee".[4] The international im-

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[2] Act of July 4, 1789, 1 Stat. 24.

[3] Jones-Costigan Act, 48 Stat. 670 (1937); Sugar Act of 1937, 50 Stat. 903, as amended and extended; Sugar Act of 1948, 61 Stat. 922, as amended and extended through 1974. Congress is now holding hearings on another extension and amendments. *United States* v. *Butler*, 297 U.S. 1 (1936), ruled that the Jones-Costigan Act tax on processors of agricultural commodities was unconstitutional when used as a device to control production. The quota system was left in effect, however, and constitutional objections were later removed by separating the processing tax and compliance payments.

[4] Sugar Program, *supra* note 1, Foreward.

portance of the Sugar Act is emphasized by the 1962 amendments[5] which provided for reallocation of the quota of any foreign country with which the U. S. is not in diplomatic relations.

Under the market division established by federal law, Hawaii's share for 1973 was nearly 10% of the annual sugar consumption of the U. S. and approximately 18% of the domestic sugar produced for U. S. consumption.[6] Any threat to a sugar supply of the magnitude furnished by Hawaii to the U.S. market would contravene national policy, as declared by the House Committee on Agriculture, to preserve within the United States the ability to produce a substantial portion of the country's sugar requirements.[7] Further, income to the government from the tax on sugar marketed within the quota system has exceeded amounts disbursed for support of the sugar program by more than $630 million and continues to provide a "net" revenue of about $20 million per year.[8]

The policy of Congress to promote sugar production in Hawaii has been evident for nearly a century. The sugar tariff, while essentially a revenue measure, afforded significant protection in the U. S. market to domestic producers. By the Treaty of Reciprocity of 1876,[9] between the United States and the Kingdom of Hawaii, this protection was extended to Hawaii. The

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[5] Sugar Act Amendments of 1962, 76 Stat. 156.

[6] U.S. Dept. of Agriculture, Sugar Reports No. 260, at 16 (1974).

[7] Sugar Program, *supra* note 1, at 29.

[8] Sugar Program, *supra* note 1, at 27.

[9] Treaty of Reciprocity of 1876 with Hawaii, June 3, 1875, 19 Stat. 625.

opportunity thus provided to Hawaiian growers was fully exploited. Within ten years, Hawaiian production increased from 13,000 to 100,000 tons. After another 45 years, annual production passed the 1,000,000 tons mark.[10]

Transfer of Water Has Had Governmental Recognition and Encouragement.

The growth of the industry in the nearly 100 years since the Treaty of Reciprocity has been due, in a large measure, to consistent encouragement and assistance given by the governments of Hawaii and the United States. During that period the water law firmly crystalized and promoted extensive development and use of water in sugar production through recognition that (1) ownership of surplus surface waters inhered in the ownership of the units of land within which those waters had their origin,[11] and (2) water lawfully acquired could be used on any land, irrespective of its source or ancient use, so long as the diversion did not injuriously affect the rights of others.[12]

In 1876, concurrently with the enactment of legislation to implement the Treaty of Reciprocity, the

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[10] U.S. Dept. of Agriculture, Agricultural Economic Report, No. 197, at 9 (1971); Sugar Manual, *supra* note 1, at 13.

[11] Maikai v. Hastings, 5 Haw. 133 (1884); Davis v. Afong, 5 Haw. 216 (1884); Haw. Com. & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675 (1904); Carter v. Territory, 24 Haw. 47 (1917); Terr. v. Gay, 31 Haw. 376 (1930).

[12] Peck v. Bailey, 8 Haw. 658 (1867); Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895); Horner v. Kumuliilii, 10 Haw. 174 (1895); Wong Leong v. Irwin, 10 Haw. 265 (1896); McBryde Sugar Co. v. Andrade, 22 Haw. 578 (1915). There is abundant evidence of ancient Hawaiian practice of diverting water by ditch systems; see, e.g., Hilo Boarding School v. Territory, 23 Haw. 595, 599 (1917) and Rec. Doc. 65, 95 and 96.

Legislative Assembly of the Kingdom of Hawaii passed two statutes to promote the construction of irrigation ditches. The first of these recognized private ownership of water and established a procedure for condemnation, by private parties as well as by government, of rights of way for irrigation ditches, canals and flumes.[13] The other was entitled "An Act to Aid the Development of the Resources of the Kingdom".[14] It contained recitals of legislative policy favoring irrigation to make land productive for sugar cane, provided for government construction and financing of irrigation works and called for the condemnation of privately owned water and use of government owned water as necessary.

Five days after passage of the last-mentioned act, the Minister of the Interior, carrying out the government policy expressed by these statutes, granted a 20-year license to Haiku Sugar Company to take all waters from streams or other sources on identified government lands forming the rainy eastern slope of Mt. Haleakala and to build facilities to collect and divert those waters.[15] Completed in two years at a cost of $80,000, this aqueduct collected and conveyed water through a 10-mile stretch of government and private lands from rain forests to arid plains.[16] Enlarged un-

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[13] Act 27, Laws of 1876. Section 1 provided that "(w)henever any person, having a right to any water, shall be desirous of leading the same on to any land in his possession for the purpose of irrigation and other uses" he could institute the statutory procedure to acquire a right of way.

[14] Act 53, Laws of 1876.

[15] Rec. Doc. 65, App. 2, 1.

[16] Rec. Doc. 65, App. 1, 1; Dean, Alexander & Baldwin and the Predecessor Partnership 4 (1950); Hawaiian Planters' Record, Vol. 37, No. 3, at 144-45 (1933).

der later licenses and leases,[17] this system now comprises 74 miles of ditches, tunnels and flumes with a delivery capacity of 455 million gallons per day of water contractually differentiated as "public" and "private" water. Approximately 62 billion gallons are delivered annually through this system; that is, the equivalent of 6 acre feet of water for the entire 31,000 acres of Hawaii's largest sugar plantation.[18]

Hawaiian government policy to foster private construction of irrigation facilities was continued through a provision in the 1894 Constitution of the Republic of Hawaii authorizing condemnation of private rights of way for irrigation facilities[19] and a legislative act of 1895 setting forth the procedure for such acquisitions.[20] In the same period and of greater significance was the 1894 reimposition, by the United States, of the tariff on foreign sugar. This had been lifted in 1890 and Hawaii, which did not share in the government bounty given domestic growers, had been badly hurt by loss of its preference over other foreign producers. One of the reasons for reimposition of the tariff was to restore Hawaii to its preferred status in the U. S. market.[21]

Congress Has Recognized Private Ownership of Water and the Right To Transport It for Beneficial Use.

Hawaii was annexed to the United States in 1898. Until it became a State in 1959, the two principal United States statutes governing the Territory of Ha-

[17] Detailed at Rec. Doc. 65, App. 2, 1-7.

[18] Rec. Doc. 65, App. 1, 3.

[19] Republic of Hawaii Constitution, Art. 12 (1894).

[20] Act 18, Laws of 1895.

[21] Sugar Program, *supra* note 1, at 30.

waii and its public lands were the Hawaiian Organic Act[22] and the Hawaiian Homes Commission Act, 1920.[23] Both contained provisions recognizing the existence of privately owned waters and long-standing practices of conveying water from wet to dry areas for irrigation and domestic use. In the Organic Act, recognition of existing irrigation practices was expressed by an amendment including "rights of way for the transmission of water for irrigation" among public uses for which the power of condemnation could be exercised.[24] With this authority, the Territorial Legislature conferred the power of eminent domain on private irrigation corporations, believing it to be "necessary in the agricultural development of the country".[25]

The Hawaiian Homes Commission Act requires a percentage of Territorial government receipts from the leasing of sugar cane lands "or from water licenses" to be paid into a fund used for loans to native Hawaiians. This provision demonstrates Congressional acceptance of the government's practice of licensing its waters to plantation companies for irrigation use outside the watershed of origin.[26] The Act perceives a distinction between "Government-owned water" and

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[22] Act of April 30, 1900, 31 Stat. 141.

[23] Act of July 9, 1921, 42 Stat. 108.

[24] Act of May 27, 1910, s. 4, 36 Stat. 443.

[25] Act 124, Laws of Hawaii 1911; Senate Judiciary Report No. 227, Senate Journal, 1911 at 687.

[26] Act of July 9, 1921, s. 213, 42 Stat. 112. Many examples of leases and licenses of government owned water for irrigation and other uses outside the watershed of origin, spanning the period 1876-1970, are set forth in Rec. Doc. 65, App. 2, 1-7. Many leases of sugar lands also, by their terms, required the lessees to import water for sugar production. Rec. Doc. 65, App. 2, 7 and 8.

"privately owned water" and recognizes the need to use water upon lands other than those of its origin in authorizing the acquisition of water to supply the livestock or domestic needs of individuals upon *any* tract of Hawaiian Homes lands.[27] The statute also gave the Commission power to acquire the use of "any ditch or pipe line constructed for the distribution and control" of water needed for *any* Hawaiian Homes tract.[28] By an amendment in 1956, the Commission also had power to grant rights of way, exchange lands and do other things "[t]o enable the construction of irrigation projects which will service Hawaiian homelands."[29]

The Hawaiian Homes Act was required to be, and was, adopted as a part of the Constitution of the State of Hawaii.[30] Hawaii accepted this condition in the act admitting Hawaii into the Union, "as a compact with the United States," that the Hawaiian Homes Act would not be amended in the particulars mentioned except through action of the Legislature of Hawaii, concurred in by the United States. It does not lie within the power of the Hawaii Supreme Court to rewrite that Act or, by judicial fiat, to render its provisions meaningless.

Hawaiian Sugar Production Is Dependent Upon Irrigation.

The rulings of the Hawaii Supreme Court, unless modified, will dry up the extensive irrigation systems on which most Hawaii plantations are absolutely de-

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[27] Act of July 9, 1921, secs. 221(a) and (b), 42 Stat. 112.

[28] Id. sec. 221(e).

[29] Act of August 1, 1956, 70 Stat. 915.

[30] Act of March 18, 1959, sec. 4, 73 Stat. 4; State of Hawaii Constitution, Art. XI (1959).

pendent. The east Maui irrigation system, briefly described above, is only one of a great number of such systems existing on every island where cane is grown. Collectively these systems deliver an average of more than 550 million gallons daily.[31] There are about 232,000 acres in sugar cane cultivation in Hawaii, including 16 plantations and 557 independent-grower farms.[32] While only about one-half is irrigated, the irrigated acreage produces two-thirds of the annual crop and most of it could not economically be farmed if it was deprived of irrigation. Sugar is the largest agricultural industry in Hawaii, is the third largest revenue producer in the State and accounts for nearly sixty per cent of Hawaii's export revenue. The annual payroll for more than 10,000 year-round sugar industry employees, who are the highest paid agricultural workers in the world, exceeds $80 million.[33] These statistics verify that continued vigor of the sugar industry is absolutely essential to the economic health of the State of Hawaii and to the vitality of the national sugar program regulated by Congress.

CONCLUSION

The constitutional questions raised by appellants and petitioners are of immediate and critical impor-

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[31] Rec. Doc. 56, Affidavit, 3 and 4; that is, about one and one-half times the 1971 daily average water consumption of the City of Philadelphia. Brief descriptions of some of these irrigation systems may be found in Rec. Doc. 65, App. 1, 1-9; The Cane Sugar Industry, Dept. of Commerce Misc. Series No. 53, at 74-78 (1917); and The Hawaiian Planters' Record, Vol. 37, No. 3, at 144 *et seq.* (1933).

[32] Rec. Doc. 56, Affidavit, 2; that is, approximately 5 times the land area of the District of Columbia.

[33] Rec. Doc. 56, Affidavit, 1 and 2; Sugar Manual, *supra* note 1, at 6.

tance, meriting review by this Court, inasmuch as national policy and State interest mandate preservation of the Hawaiian sugar industry. The decision of the Hawaii Supreme Court has overruled more than a century of established water law and usage. Unrelenting application of the novel concepts announced in that decision would imperil the sugar industry as well as destroy confidence in the fairness of the Hawaiian judicial process.

Probable jurisdiction of the appeal should be noted and writs of certiorari should be granted.

Respectfully submitted,

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